

NTSB Order No. EA-3699

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 14th day of October, 1992

Respondent .

Docket SE-12702

The respondent has appealed from the oral initial decision of Administrative Law Judge Jimmy N. Coffman, issued at the conclusion of an evidentiary hearing on September 2, 1992.<sup>1</sup> By that decision the law judge affirmed an emergency order of the Administrator revoking respondent's commercial pilot certificate on allegations that he lacks the care, judgment, and

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responsibility to hold an airman certificate because of his operation of civil aircraft N15644 on February 4, 1992 on a passenger-carrying flight for compensation or hire under the provisions of FAR Part 135,<sup>2</sup> when he was not Part 135-qualified.

The Administrator's emergency order, which served as the complaint in this matter, alleges in pertinent part as follows:

2. On or about February 4, 1992, you acted as pilot in command of civil aircraft N15644 a Piper model PA-28R-200, the property of another, on an IFR flight for Begleys Air Transport on a passenger-carrying flight for compensation or hire from Bowling Green, Kentucky to Indianapolis, Indiana.
3. At the time of the flight described above, you operated the aircraft in IFR conditions with a passenger without a second in command in the aircraft.
4. You were not qualified to carry passengers in IFR conditions under Part 135.
5. Prior to your departure from Bowling Green, IFR conditions were known to exist over the Indianapolis area as well as the other areas along your route of flight.
6. The operating limitations contained in the approved Airplane Flight Manual (AFM) for civil aircraft N15644 do not authorize operations in icing conditions.
7. At the time of the above described flight, you operated the aircraft into known icing conditions and did encounter ice during your approach to Indianapolis.
8. You acted as pilot-in-command when you had not demonstrated your knowledge in the areas designated by the regulations by completing an oral or written examination since the beginning of the 12th calendar month before the service. You also had not demonstrated competency in practical skills and techniques since the beginning of the 12th calendar month before service.
9. At the time of the flight herein described, you had not completed a route or line check within the beginning of the 12th calendar month before the flight.

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<sup>2</sup>Federal Aviation Regulations, 14 C.F.R. Part 135.

10. You operated the above described aircraft in instrument flight conditions without having completed an instrument competency check during the preceding 6 months as required.

11. You failed to familiarize yourself with all available information concerning this flight including weather reports and forecasts.<sup>3</sup>

12. Your aircraft was observed by Air Traffic Control leaving the Final Approach Course and reversing course while you were rapidly descending and not in communication with the Tower or Final Radar controllers. Air traffic control was required to turn a B 727 to avoid your aircraft. Your aircraft was at 500 feet AGL when your descent finally stopped and radio contact was established.

13. Your operation of the aircraft, in the manner and under the circumstances described above was reckless so as to endanger the lives and property of others.

As a result, the Administrator alleged that respondent violated FAR sections 91.9, 91.13(a), 91.103(a),<sup>4</sup> 135.101, 135.181(a)(1), and 135.293(a) and (b), 135.297(a), and 135.299(a).<sup>5</sup>

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<sup>3</sup>The law judge did not affirm this allegation since evidence was produced at the hearing that respondent did obtain a weather briefing before departure.

<sup>4</sup>See footnote 3, above.

<sup>5</sup>Sections 91.9, 91.13(a), 135.101, and 135.181(a)(1) provide in pertinent part as follows:

"§ 91.9 Civil aircraft flight manual, marking, and placard requirements.

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approve Airplane or Rotorcraft Flight Manual....

§ 91.13(a) Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 135.101 Second in command required in IFR conditions.

Respondent asserts on appeal that the law judge erred in affirming the Administrator's emergency order, as a preponderance of the evidence fails to establish the allegations. The Administrator has filed a brief in reply, urging the Board to affirm the initial decision and the Administrator's order.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's emergency order revoking respondent's commercial pilot certificate. For the reasons that follow, we will deny respondent's appeal.

The record reveals that on February 3, 1992, a local businesswoman called Begleys Air Transport, Inc., a Part 135 operator, to determine if she could afford to charter an aircraft for a business trip she was required to make the next day to Indianapolis, Indiana. The woman testified that she had driven past Begleys Air Transport before, and had seen their sign  
(..continued)

Except as provided in §§ 135.103 and 135.105, no person may operate an aircraft carrying passengers in IFR conditions, unless there is a second in command in the aircraft.

§ 135.181 Performance requirements: Aircraft operated over-the-top or in IFR conditions.

(a) Except as provided in paragraphs (b) and (c) of this section, no person may-

(1) Operate a single-engine aircraft carrying passengers over-the-top or in IFR conditions...."

Sections 135.293 (a) and (b), 135.297(a), and 135.299(a) prescribe various tests and checks required for pilots in operations conducted under FAR Part 135.

advertising "charter services." She obtained their telephone number from the yellow pages and called. The person who answered the telephone quoted her charter rates which she considered too high. She tried to negotiate a lower price, indicating that she might need charter services on a frequent basis and would be willing to use the company exclusively in the future, if she could get a good price. The unidentified individual referred her to the owners of Begleys Air Transport, and gave her the telephone number for their corporate offices in Glasgow, Kentucky.

The woman testified that she then called Glasgow, and spoke with an unidentified man<sup>6</sup> who suggested to her that if the quoted rates for the twin-engine aircraft were too high she might call back to Begleys Air Transport and ask if they would be willing to transport her in a smaller, single-engine aircraft at a lower rate, since she would be the only passenger on the trip. The woman testified that she again called Begleys Air Transport and spoke with respondent, who told her he could transport her in a smaller aircraft for the price of \$380.

According to respondent, he never offered to transport the businesswoman for a set price. He claims that he told her that he was only a flight instructor and not a "Part 135" pilot, and that the single-engine aircraft was not a "Part 135" aircraft, but that he could rent the aircraft to the businesswoman on an

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<sup>6</sup>According to her contemporaneous notes of the conversation, she spoke with Mr. Begley, the owner of the Part 135 operation. (TR-70). Mr. Begley denies the conversation.

hourly rate, and provide her with his services as a pilot for "no charge."<sup>7</sup> Respondent admits that he did not obtain a written rental agreement and that they only agreed verbally and with "a handshake." (TR 213). Respondent claims he told the businesswoman no less than three times before the flight that he was not a Part 135 pilot, and that this would not be a Part 135 flight. (TR 173, 174, 175). He produced three witnesses, all Part 135 pilots for Begleys, who claim that they heard respondent make these statements. According to an FAA aviation inspector who met the aircraft after it landed, respondent first claimed that the woman had rented the aircraft, but then admitted to the inspector that he had been concerned about the legality of the flight but had taken it so he would not lose his job with Begleys Air Transport, Inc. (Administrator's Exhibit A-12).

Respondent obtained a weather briefing from the local Flight Service Station on the morning of the flight. The report from the Flight Service Station was introduced into evidence and indicates that respondent was given flight precautions for icing and turbulence on the route of his flight. Respondent filed an IFR flight plan. (Administrator's Exhibit A-10). The official weather reports indicate reports of icing in all of the states around Indiana, but not in Indiana. Hourly surface weather observations indicate that the temperature at Indianapolis was

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<sup>7</sup>Respondent admits that he was willing to fly her in order to build up his hours so he could qualify as a Part 135 pilot for Begleys Air Transport, Inc.

dropping 6° per hour, and that weather conditions with regard to IFR [instrument flight rules] flight, i.e., visible moisture, were deteriorating. (Administrator's Exhibit A-8). According to the testimony of another FAA aviation safety inspector, the hourly weather reports indicate a substantial likelihood that respondent would have encountered icing conditions. Two aircraft within the vicinity of respondent's aircraft did in fact report icing conditions at the time of respondent's approach to landing.

The aircraft respondent was operating was not equipped for icing conditions.

According to the testimony of the passenger, she saw ice all over the windshield and on the wings during the approach to Indianapolis. She also testified that she saw large chunks of ice coming off of the wings as they descended. Respondent denies that he ever encountered icing conditions on his approach to landing, and in fact when air traffic control queried him on this, when another aircraft at 3,000 feet reported picking up 1/4" rime ice, respondent said that he saw no ice on his aircraft. (TR-97).

According to the testimony of the air traffic controller working radar approach control at the time of respondent's landing, he issued to respondent a series of vectors to place him on the ILS [instrument landing system] approach to runway 32. After a few turns, he established the aircraft within 20° to intercept the final, descended respondent's aircraft to 2,600 feet, and cleared respondent for the approach. The aircraft

proceeded to intercept the ILS but then the controller noticed that respondent appeared to be straying off of the approach course. The controller called this to respondent's attention, and respondent advised that he was not receiving the localizer.<sup>8</sup>

The controller gave him a new heading to put him back on the center line. The aircraft appeared to go back to the center line and fly the approach, but it then deviated again laterally. The controller issued respondent another heading to put him back on the approach, and respondent deviated a third time. The controller then handed respondent off to another controller because he had to deal with other traffic, and respondent was placed in a holding pattern. Respondent's aircraft was next observed on radar making a sudden, rapid descent from 1,200 to 500 feet AGL. Air traffic control issued repeated broadcasts to respondent over the radio which were not answered. One controller is heard on the tape recording of communications telling another controller that respondent's aircraft appears to be heading into the ground.<sup>9</sup> Respondent was issued a low altitude alert, the controller determined that an emergency situation existed, and a 727 was instructed to climb to insure

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<sup>8</sup>The localizer is the component of the ILS which provides course guidance to the runway.

<sup>9</sup>The passenger described a very steep descent which led her to believe that they were about to crash. She testified that the aircraft was barely above tree tops and telephone poles. (TR-39). Respondent denies a rapid descent. He also claims that the low altitude was permissible because he was on an ILS approach to a landing.



separation from respondent's aircraft.<sup>10</sup> Respondent levelled off at 500 feet AGL and re-established communications with air traffic control. He was given a surveillance approach, and subsequently landed the aircraft without further incident.

Respondent denies encountering icing conditions, and his explanation for the passenger's claim of seeing ice is simply that she was "scared." (TR-181). Moreover, he claims, if the aircraft had accumulated ice for 20 minutes while it was in a holding pattern, the aircraft would have crashed.<sup>11</sup> Respondent claims that his rapid descent was intentional in order to break out of the clouds, and he claims that he never went below 1,200 feet MSL. Respondent produced the deposition testimony of a radio technician who examined the aircraft's navigation radios immediately after landing. He testified that the reason respondent could not pick up the localizer was because the radios were old and had only 20-channel capability, but that the new runway at Indianapolis required 40-channel capability. The technician admitted on cross-examination that had respondent consulted the approach plates and the aircraft manuals before operation of the aircraft, he could have determined that the radio did not have the necessary capability to effect an ILS

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<sup>10</sup>According to the controller, he considered respondent to be in an emergency situation because he was descending at 1,800 feet per mile rather than the standard 300 feet per mile. (TR-110, 122).

<sup>11</sup>The Administrator suggests that the ice was the cause for the sudden, rapid descent of the aircraft.

approach to runway 32 at Indianapolis airport.<sup>12</sup>

The law judge found that the operation of this aircraft was conducted under FAR Part 135, and that respondent, who was not Part 135 qualified, operated the aircraft in IFR conditions without a second in command. As to the allegations with regard to the icing conditions, the law judge made specific credibility findings in favor of the passenger's testimony. As to the low altitude, the law judge rejected respondent's claim that it was permissible because he was on an approach to a landing, noting that respondent was neither on approach nor was he executing a missed approach at the time of the rapid descent. Accordingly, the law judge affirmed all the allegations of the Administrator's emergency revocation order.<sup>13</sup> We adopt the law judge's findings as our own.

The law judge's findings were in large part based on his credibility determination in favor of respondent's passenger, and respondent offers us no persuasive reason to disturb these findings. Resolution of credibility issues, unless made in an arbitrary or capricious manner, are within the exclusive province of the law judge. Administrator v. Smith, 5 NTSB 1560, 1563 (1987). The passenger's claim that she observed ice on the aircraft is more than sufficiently corroborated by the official weather reports, which indicate that surface temperatures were

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<sup>12</sup> Respondent's radio problems were thus of his own making, and not mitigating, as he suggests.

<sup>13</sup> Except the §91.103(a) allegation, see footnotes 3 and 4, supra.

rapidly dropping, and by icing reports made by more than one other pilot in the area.

Turning to the question of whether this operation was conducted under Part 135, we reject respondent's contention that this issue also rests on the law judge's credibility findings. Respondent's claim, that he and the passenger "agreed" that she would rent the aircraft and thereby exempt it from the requirements of Part 135, is irrelevant to the determination of the nature of the operation. Even if respondent repeatedly told the passenger that he was not a Part 135 pilot and this was not a Part 135 aircraft, and even if she agreed to rent the aircraft for an hourly rate as opposed to a set price, neither fact could ipso facto make respondent's operation a Part 91 operation. There is no dispute that this passenger approached a Part 135 operator, Begleys Air Transport, Inc., which held itself out as a common carrier for the transport of paying passengers. Respondent was a flight instructor at Begleys, and while he may have acted under the color of Begleys' authority, he had no right to offer this customer the rental of one of Begleys' aircraft which was not on its Part 135 certificate, and then provide his pilot services at "no charge."<sup>14</sup> Nor should an unsuspecting

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<sup>14</sup>We reject respondent's suggestion that the fact that he personally received no money is relevant in our determination of the nature of this operation. Nevertheless, we note that aside from the fact that the passenger agreed to pay Begleys for this flight and suggested that there was also a possibility for her future business, respondent admits that he would benefit economically by gaining flight time which he needed in order to qualify as a Part 135 pilot.

paying passenger be expected to understand the differences between a Part 91 operation and a Part 135 operation, and it cannot be said that this passenger understood the consequences of "renting" the aircraft and thus knowingly contracted away her rights to the higher safety standards expected of Part 135 operators and Part 135 pilots. See Administrator v. Cunningham, 5 NTSB 516, 519 (1985) (Holding that passengers onboard an airborne aircraft which departed under Part 135 could not agree that the flight was under Part 91 for the sole purpose of avoiding instrument landing minimums applicable to a Part 135 operation); see also Administrator v. Dade Helicopter Jet Services, Inc., NTSB Order No. EA-2740 (1988) (Evidence of a lease agreement signed by paying passenger so as to avoid the requirements of Part 135 could not rebut indicia showing operator retained complete operational control over aircraft and pilot). Respondent's actual operation of this flight highlights the need for the training and testing requirements contained in Part 135, and evidences that he lacks the qualifications to hold a commercial pilot certificate.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The Administrator's emergency order of revocation and the initial decision are affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.